U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Frankfurt Date: MAR 21 2000

IN RE: Applicant: [redacted]

APPLICATION: Applications for Waiver of Grounds of Inadmissibility under §§ 212(h) and (i) of the Immigration and Nationality Act, 8 U.S.C. 1182(h) and (i)

IN BEHALF OF APPLICANT: Self-represented

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS: Public Copy

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

For Terrance M. O'Reilly, Director
Administrative Appeals Office

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DISCUSSION: The dual waiver applications were denied by the Officer in Charge, Frankfurt, Germany, and are now before the Associate Commissioner for Examinations on appeal. The officer in charge's decision denying the application under § 212(i) of the Act will be withdrawn and the appeal of that decision will be rejected. The appeal of the officer in charge's decision under § 212(h) of the Act will be dismissed.

The applicant is a native and citizen of Switzerland who was found to be inadmissible to the United States by a consular officer under § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude with the additional possible refusal ground of § 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or misrepresentation on several occasions as a nonimmigrant. The applicant married a United States citizen in June 1993 in Switzerland and is the beneficiary of an approved immediate relative visa petition. The applicant seeks the above waiver in order to return to the United States.

The officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, the applicant states that he would love to live in the United States and he believes that the decision is wrong. The applicant states that he turned his court records in at the American Consulate in December 1988 when he obtained a student visa. The applicant asserts that on the Form I-94W, question B asks if the person was ever in jail for more than 5 years for any of the listed crimes. The applicant states that he did not have to go to jail. The applicant indicates that hardship does exist when a person cannot choose where one wants to live and his wife wants to go back home.

The issue of inadmissibility is not the purpose of this proceeding. Issues of inadmissibility are to be determined by the consular officer when an alien applies for a visa abroad. This proceeding must be limited to the issue of whether or not the applicant meets the statutory and discretionary requirements necessary for the exclusion ground to be waived. 22 C.F.R. 42.81 contains the necessary procedures for overcoming the refusal of an immigrant visa by a consular officer.

Service Operations Instructions 212.7(a)(1)(i) provide if, after receipt by a Service office abroad, grounds of inadmissibility other than those for which the waiver is sought are discovered, the application and all relating documents should be returned to the consular officer for reconsideration. All pertinent information relative to the additional grounds of inadmissibility should accompany the application when returned to the consular officer.

The consulate refusal worksheet contained in the record shows that (1) the applicant's visa application was refused under

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§212(a)(2)(A)(i)(I) of the Act; (2) the refusal was confirmed by the Consul General and (3) the only waiver requested was under the provisions of § 212(h) of the Act. The refusal worksheet indicates that an additional refusal ground could be misrepresentation under § 212 (a)(6)(C)(i) of the Act. Since the present record fails to indicate that a consular officer found the applicant prima facie ineligible under § 212(a)(6)(C)(i) of the Act, and that this determination was confirmed by the appropriate authority, the Associate Commissioner will withdraw that portion of the officer in charge's decision, will not address that ground of inadmissibility on appeal and will reject the appeal of that particular ground.

In part of the record, the applicant's crime is referred to as Assault with Intent to Commit Rape. According to the English translation, the record reflects that the applicant was convicted of the charges of (1) Attempted Gross Indecency with a Minor (as defined in Article 191 in conjunction with Article 21), and (2) Compulsion (as defined in Article 181).

Article 191 indicates that Gross Indecency with a Minor means abusing a child under 16 years of age by way of sexual intercourse or similar action.

Article 21 refers to a person having once commenced a crime or misdemeanor nevertheless does not complete the said criminal act, but must be determined to carry out the said act.

Article 181 indicates that Compulsion is committed by anyone who, by means of violence or menaces, or any other interdiction of a person's freedom of action, compels the said person to commit, omit or tolerate something.

On August 22, 1997, the record reflects that the applicant dragged the injured party from her moped onto the ground and thence into an adjoining wheatfield, but due to the resolute defence shown by the victim, the applicant was compelled to desist and run away. The applicant was sentenced to three months in prison with imposition of the sentence suspended and he was placed on probation for two years.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) CRIMINAL AND RELATED GROUNDS.-

(A) CONVICTION OF CERTAIN CRIMES.-

(i) IN GENERAL.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

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(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, is inadmissible.

(h) WAIVER OF SUBSECTION (a)(2)(A)(i)(I), (II), (B), (D), AND (E).-The Attorney General may, in his discretion, waive application of subparagraph (A)(i)(I),...if-

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) ...the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or for adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of

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the Attorney General to grant or deny a waiver under this subsection.

For § 212(h) purposes, less than 15 years have elapsed since the applicant committed his last violation. Therefore, he is ineligible for the waiver provided by § 212(h)(1)(A) of the Act.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under § 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. The key term in the provision is "extreme." Therefore, only in cases of great actual or prospective injury to the qualifying relative(s) will the bar be removed. Common results of the bar, such as separation, financial difficulties, etc., in themselves, are insufficient to warrant approval of an application unless combined with much more extreme impacts. Matter of Ngai, 19 I&N Dec. 245 (Comm. 1984). "Extreme hardship" to an alien himself cannot be considered in determining eligibility for a § 212(h) waiver of inadmissibility. Matter of Shaughnessy, 12 I&N Dec. 810 (BIA 1968).

The record reflects that the applicant's wife has been residing in Switzerland since their marriage in 1993. They are the parents of a child born in November 1997 in Switzerland. The applicant is gainfully employed and he and his wife have saved a certain amount of money during their marriage. The only hardship expressed in this matter is the hardship of the applicant's wife being separated from her family and friends. However, such hardship is not extreme.

A review of the documentation in the record, when considered in its totality, fails to establish the existence of hardship caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to travel to the United States. The assertions of hardship and other problems are unsupported in the record. It is concluded that the applicant has not established the qualifying degree of hardship in this matter. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(h), the burden of proving eligibility remains entirely with the applicant. Matter of Ngai, supra. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.